United States Senate
Republican Policy Committee
Jon Kyl, Chairman
347 Russell Senate Office Building
Washington, DC 20510
202-224-2946
http://rpc.senate.gov

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The Perils of Universal Jurisdiction

Executive Summary

- On November 14, 2006, the Center for Constitutional Rights, an American non-profit organization, asked German authorities to bring a criminal case against Donald Rumsfeld, George Tenet, Jay Bybee—who is currently a sitting federal judge—and others for conduct occurring in Iraq.

- This is the essence of "universal jurisdiction," the prosecution of one country's officials by a second country for offenses occurring on the territory or against the citizens of a third country. It is an exception to the general rule that a country must have some connection to conduct in order to regulate that conduct.

- Universal jurisdiction is a part of what Henry Kissinger describes as a recent movement "to submit international politics to judicial procedures."

- The United States has the power to limit the expansion of universal jurisdiction, and it should do so. U.S. action would be comprised of both Executive and Legislative action.

- The Executive should resist the abusive expansion of the doctrine by objecting publicly when universal jurisdiction is applied in ways inimical to U.S. interests.

- Congress should pass a resolution condemning the most recent request of German authorities to bring a criminal action against Secretary Rumsfeld, and encouraging the German prosecutorial authorities to reject the request.

- Both Houses of Congress should increase their oversight of this issue and examine the long-term ramifications of universal jurisdiction expansion.

- The Senate in particular should be sure to examine carefully any treaty with a provision that purports to create universal jurisdiction over a crime.

- The consequence of silence is that politically motivated exercises of universal jurisdiction may pass into accepted practice over sufficient time.

Introduction

On November 14, 2006, the Center for Constitutional Rights, an American non-profit organization, asked German authorities to bring a criminal case against Donald Rumsfeld, George Tenet, Jay Bybee—who is currently a sitting federal judge—and others for conduct occurring in Iraq. It did so by abusing the concept of universal jurisdiction,[1] which is an exception to the general rule that a state (i.e., country) must have some connection to conduct in order to regulate that conduct. This is not a unique effort, as it is the second time in two years that this organization has sought to bring a criminal case against Secretary Rumsfeld in a German court for conduct occurring in a third country. This paper examines the development and application of the customary international law norm of universal jurisdiction, and outlines how the concept has been abused to bring court actions in third-party countries against U.S. officials for the officials' international political actions. This counsels for increased vigilance of the United States in minding the future development of the norm, and Senatorial action actively objecting to another state's use of universal jurisdiction to bring politically motivated prosecutions against U.S. officials.

Customary International Law Background

Before examining how universal jurisdiction is being abused to the detriment of U.S. interests, it is crucial to understand how customary international law develops.

Defined

"International custom, as evidence of a general practice accepted as law," is a recognized source of international law.[2] In fact, the corpus of international law historically was more attributed to custom than to explicit agreements, although treaties and other international agreements are the more publicly obvious sources of international law.[3] The Restatement (Third) of the Foreign Relations Law of the United States defines "customary international law" as those rules that result "from a general and consistent practice of states followed by them from a sense of legal obligation."[4] The rules of customary international law are essentially norms of behavior.[5]

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[1] *See* Lee A. Casey & David B. Rivkin, *The Dangerous Myth of Universal Jurisdiction*, *in* A COUNTRY I DO NOT RECOGNIZE, p. 135, 138 (Robert H. Bork ed. 2005) (noting how universal jurisdiction is the prosecution of one state's officials "by a second country for offenses on the territory or against the citizens of a third country").

[2] Statute of the International Court of Justice, Art. 38(1)(b) ("ICJ Statute"). The Statute of the International Court of Justice is annexed to the Charter of the United Nations, and is reprinted at 59 Stat. 1031 (1945).

[3] Restatement (Third) of the Foreign Relations Law of the United States, Part I, Chapter I, Introductory Note (1987) ("Until recently, international law was essentially customary law."). "[T]reaties have [now, however,] become the principal vehicle for making law for the international system." Restatement at Part I, Chapter I, Introductory Note (1987). *See also* Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 Mich. L. Rev. 390, 396 (1998) ("[T]here has been a proliferation of treaties, such that treaty-making has now eclipsed custom as the primary mode of international law-making.").

[4] Restatement at § 102. This definition has two key components: 1) widespread and uniform state practice, and 2) following that practice out of a sense of legal obligation, known as *opinio juris*, which stands in contradistinction to complying with a practice out of courtesy or habit. *See* Restatement at § 102, cmnt c. The Restatement is published

Based on Consent

A traditional principle of international law is that it is based on the consent of states.[6] In order for the rules of international law to be properly applied to states, those states must have accepted those rules. As such, states are generally not bound by customary international law norms to which they persistently and consistently object during the time the norm was in the process of maturing into an accepted customary international law norm.[7]

Consent, however, can be ascribed to a state from its silence during the development of a norm. If a state remains silent as a new rule is established, it may be held to have acquiesced to the new rule by its failure to object. In this regard, customary international law norms do not need explicit support to develop; they can develop out of acquiescence.[8] Thus, there is an affirmative duty upon states to object to a proposed norm in order to halt it from becoming an accepted norm of customary international law over time.

Jus Cogens/*Peremptory Norms as a Departure from Consent*

There is a major exception to the consent-based nature of customary international law. Peremptory norms (*jus cogens*)[9] represent a limited number of norms that purport to achieve binding force on all states from which no state may derogate.[10] They intend to capture practices that are so universally and fundamentally abhorrent as to be self-evidently prohibited. The concept of *jus cogens* norms is widely acknowledged as a principle of international law, but there is no universally accepted and recognized list of what these norms are. In fact, the United Nations International Law Commission specifically refuses to catalog which norms are considered *jus cogens* norms.[11] The Restatement, on the other hand, asserts that prohibitions

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by the American Law Institute, and is generally regarded as a persuasive declaration of the foreign affairs law of the United States. Though not binding authority, U.S. courts, including the Supreme Court, do cite to it in their official opinions. *E.g.*, *Medellin v. Dretke*, 544 U.S. 660, 670 (2005).

[5] A norm is "a rule that is neither promulgated by an official source, such as a court or a legislature, nor enforced by the threat of legal sanctions, yet is regularly complied with." Richard Posner, *Social Norms and the Law: An Economic Approach*, 87 Am. Econ. Rev. 365, 365 (1997).

[6] Restatement at § 102, Reporters' Notes ¶ 1 (noting the "traditional principle that international law essentially depends on the consent of states").

[7] *See* Restatement at § 102, cmnt d.

[8] Restatement at § 102, cmnt b (providing that "inaction may constitute [the] state practice" required in the development of a customary international law norm). *Cf. Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981) (noting that "'long-continued practice, known to and acquiesced in by Congress, would raise a presumption that the [action] had been [taken] in pursuance of its consent'") (brackets in original) (quoting *United States v. Midwest Oil Co.*, 236 U.S. 459, 474 (1915)).

[9] *Jus cogens* means "compelling law."

[10] Vienna Convention on the Law of Treaties, art. 53, 1155 U.N.T.S. 331, 8 I.L.M. 679 (opened for signature May 23, 1969, entered into force Jan. 27, 1980) (defining a peremptory norm of general international law as a "norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted"). The United States is not a party to this treaty but essentially accepts the treaty as a declaratory restatement of customary international law governing the topic of treaties in general. *See* Restatement at Part III, Introductory Note.

[11] United Nations International Law Commission, Report of the Fifty-Seventh Session, ¶ 489, U.N. Doc. No. A/60/10 (2005).

against genocide, slavery, disappearances,[12] torture, prolonged arbitrary detention, and systematic racial discrimination have all achieved the status of peremptory norms.[13] There seems to be a disconnect in such a list, however, as customary international law, by definition, is supposed to reflect state practice, and, unfortunately, "'it is still customary for a depressingly large number of States to trample upon the human rights of their nationals.'"[14] Nevertheless, the theory of peremptory norms is that such norms can bind the international community of states as a whole, regardless of the consent of individual states.

Universal Jurisdiction

Universal jurisdiction and peremptory norms are analogous in their universality. The violation of certain peremptory norms is amenable to universal jurisdiction, while the violation of other norms does not attract universal jurisdiction.

Definition & Scope

Universal jurisdiction is a customary international law norm that permits states to regulate certain conduct to which they have no discernable nexus. The traditional rule of customary international law requires some link of territory or nationality for a state to exercise criminal jurisdiction over the criminal act.[15] Universal jurisdiction departs from this rule because it does "not require a link between any part of the offence and the state seeking to exercise jurisdiction."[16]

Universal jurisdiction is reserved for a limited collection of offenses so heinous and of universal concern that the perpetrators are labeled *hostes humani generis*, the enemies of all mankind. All states, then, have jurisdiction to regulate the conduct regardless of the location of the offense or the nationalities of the offender or the victims. The Restatement acknowledges, as do most legal scholars, that piracy, slave trade, war crimes, and genocide are all subject to universal jurisdiction.[17] Moreover, it is also likely the case that torture has attained the status of being so universally reviled that it is subject to universal jurisdiction as a norm of customary

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[12] Although definitions of the term vary, characteristics common to most definitions are that it is an act of abduction by an organized group, usually a government, followed by a refusal to disclose the fate or whereabouts of the person abducted. *E.g.*, Declaration on the Protection of All Persons from Enforced Disappearance, U.N. General Assembly Resolution 47/133, U.N. Doc. No. A/RES/47/133, Feb. 12, 1993.

[13] Restatement at § 702 & § 702 cmnt n.

[14] Curtis A. Bradley & Jack L. Goldsmith, III, *The Current Illegitimacy of International Human Rights Litigation*, 66 Fordham L. Rev. 319, 328 (1997) (quoting Bruno Simma & Philip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles*, 12 Austl. Y.B. Int'l L. 82, 90 (1992)).

[15] *E.g.*, Bartram S. Brown, *The Evolving Concept of Universal Jurisdiction*, 35 New Eng. L. Rev. 383, 383 (2001). In detail, these bases of jurisdiction are territorial (crimes committed in the territory of the prosecuting state); active nationality (crimes committed abroad by nationals of the prosecuting state); passive personality (crimes affecting nationals of the prosecuting state); and protective (crimes affecting certain fundamental interests of the prosecuting state).

[16] Anne-Marie Slaughter, *Defining the Limits: Universal Jurisdiction and National Courts*, *in* UNIVERSAL JURISDICTION, p. 168, 168 (Stephen Macedo ed., 2004).

[17] Restatement at § 404; Madeline H. Morris, *Universal Jurisdiction in a Divided World: Conference Remarks*, 35 New Eng. L. Rev. 337, 347 (2001).

international law.[18] In this regard, there is substantial overlap between the potential list of crimes that would violate *jus cogens* norms and those that may be subject to universal jurisdiction.

Universal Jurisdiction in Practice

Universal jurisdiction is a part of what Henry Kissinger describes as a recent movement "to submit international politics to judicial procedures."[19] Indeed, it is part of a trend to create legal measures to constrain the ability of states to act unilaterally, especially in the use of force.[20] For the United States this is particularly troublesome, for example, because it is the jurisdictional basis by which some parties are bringing court cases against U.S. governmental officials to litigate elements of the Iraq war. For example, on two separate occasions, once in November 2004, and again in November 2006, the Center for Constitutional Rights ("CCR"), an American non-profit organization, used Germany's universal jurisdiction statute and rules of procedure, instead of the U.S. political process or judicial system, to encourage German authorities to bring a criminal complaint in Germany for war crimes against Secretary of Defense Donald Rumsfeld, former Director of Central Intelligence George Tenet, and many others, for the treatment of detainees.[21] Other egregious examples include:

- Belgium has entertained similar lawsuits under its universal jurisdiction statute against former President George H.W. Bush and then-Chairman of the Joint Chiefs of Staff Colin Powell for acts in the first Gulf War; as well as against General Tommy Franks for alleged war crimes in the current Iraq war.[22]

- A criminal case against former Israeli Prime Minister Ariel Sharon was brought under Belgium's universal jurisdiction statute.[23]

- Parties have even used a U.S. universal jurisdiction statute to hijack the U.S. judicial system for their own political ends. CCR has taken the jurisdiction authority of the Torture Victim Protection Act[24] to bring a civil case on behalf of Lebanese nationals

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[18] Curtis A. Bradley, *Universal Jurisdiction and U.S. Law*, 2001 U. Chi. Legal F. 323, 324 ("Although there is some debate over what additional offenses are now subject to universal jurisdiction, most scholars seem to agree that it extends to the slave trade, genocide, war crimes, and torture.").
[19] Henry Kissinger, *The Pitfalls of Universal Jurisdiction*, Foreign Aff. (July-Aug 2001), at 86, 86.
[20] John R. Bolton, *The Risks and Weaknesses of the International Criminal Court from America's Perspective*, Law & Contemp. Probs. (Vol. 64, No. 1, Winter 2001), at 167, 167-68.
[21] CCR promulgates its 2004 efforts, which were focused on allegations at Abu Ghraib, at http://www.ccr-ny.org/v2/legal/september_11th/sept11Article.asp?ObjID=1xiADJOOQx&Content=472. The German prosecutor refused to prosecute the case and German courts have affirmed that decision. CCR advertises its current efforts at http://www.ccr-ny.org/v2/GermanCase2006/extendedsummary.asp.
[22] Sean D. Murphy (ed.), *U.S. Reaction to Belgian Universal Jurisdiction Law*, 97 Am. J. Int'l L. 984 (2003).
[23] Murphy, 97 Am. J. Int'l L. at 985.
[24] The Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C.A. § 1350 note), is a universal jurisdiction statute providing a civil cause of action for the recovery of damages from an individual who engages in torture or extrajudicial killing. Curtis A. Bradley, *Universal Jurisdiction and U.S. Law*, 2001 U. Chi. Legal F. 323, 341-42, 342 n. 85 (referring to the TVPA as "an exercise of universal jurisdiction," and noting that the accompanying Senate report referred to the doctrine of universal jurisdiction). Even though the concept of universal jurisdiction has its foundations in the criminal context, providing a civil analog is a nascent, but

> against Moshe Ya'Alon, the former Chief of Staff of the Israeli Defense Forces, for alleged extrajudicial killings for acts occurring in the south of Lebanon in 1996.[25] Thus, in this case, groups are trying to use U.S. courts to adjudicate the behavior of another country's official for his actions not taking place in the United States or involving U.S. persons, but rather for actions in a third country.

Although "the attraction of universal jurisdiction is compelling" because of the obvious interest in providing accountability for the crimes in question, all of these examples illustrate the very real risk of politically motivated prosecutions.[26] As one commentator, Professor Madeline Morris, predicted in 2001:

> If we have not seen grave abuses, the explanation may lie in the fact that the modern use of universal jurisdiction is in its nascent stages. The 'enormous potential of universal jurisdiction' is likely in the process of being recognized, not only by the well-intentioned states and organizations of the world, but also, by the malefactors. We are only now seeing the emergence of the active exercise of universal jurisdiction. . . . [H]uman rights organizations are actively engaged in identifying, researching, and persuading governments to pursue additional cases.[27]

Policy Options

Customary international law, by definition, develops through state practice, and it does not develop unidirectionally. It can contract, or it can expand. In this regard, the United States can shape the norm of universal jurisdiction in a variety of ways because a customary international law norm by its nature is not set in stone. As Professor Morris has explained:

> Even if customary international law were determined currently to entail universal jurisdiction over some crime or crimes, the question would remain whether that should continue to be the case. Law can change. Treaties can be created or amended; parties can adhere or withdraw. Customary international law can be altered through the acts of states. Development of the customary law of jurisdiction may entail expansion, retraction, or refinement of the reach of extraterritorial jurisdiction, as warranted.[28]

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perhaps growing, trend. *See, e.g.*, Donald Francis Donovan & Anthea Roberts, *The Emerging Recognition of Universal Civil Jurisdiction*, 100 Am. J. Int'l L. 142, 152 (2006) (suggesting that, while the norm is "embryonic, state practice endorsing the exercise of universal civil jurisdiction as a permissive customary norm is beginning to emerge"). The Restatement asserts that "universal jurisdiction [is] not limited to criminal law." Restatement at § 404, cmnt b. The American Society of International Law devoted an entire panel to the concept of universal civil jurisdiction at its 99th annual meeting in 2005.

[25] http://www.ccr-ny.org/v2/legal/human_rights/rightsArticle.asp?ObjID=eqVBNxvlcx&Content=682.

[26] Morris, 35 New Eng. L. Rev. at 338 & 354.

[27] Morris, 35 New Eng. L. Rev. at 358.

[28] Morris, 35 New Eng. L. Rev. at 352.

Thus, the United States has several options to pursue.

First, the United States can accept the norm of universal jurisdiction, and take various actions from there. For example, it could take action to expand that list of crimes for which universal jurisdiction is said to exist, or perhaps take action to refine the norm to apply it more circumspectly by limiting its application to the current list of crimes for which it is said to exist. The United States could formulate its policy with respect to the norm in, amongst other ways, treaty negotiations or by legislative action (to be discussed later).

Second, in the complete opposite direction, rejecting the norm *in toto* is also an option. International law does recognize the concept of "desuetude," whereby a customary norm would be considered no longer accepted due to repeated rejection of a particular practice.[29] An example of this could be the Universal Jurisdiction Rejection Act,[30] which Congressman Gary Ackerman introduced in 2003. This bill would have made it the policy of the United States to reject any claim of universal jurisdiction made by foreign governments and to refuse to render any assistance or support to any foreign government pursuing an investigation or prosecution under a universal jurisdiction act.[31] This state practice could be construed as the opening steps by the United States to attempt to bring the norm, in its entirety, into desuetude. It is not as if the United States would be taking the position that those who have committed the worst crimes should not be prosecuted, but rather it would be taking steps to eliminate the prosecution of such crimes by states with no traditional nexus to that crime. Instead, the United States would be advocating that the political or judicial systems of states of the perpetrators or victims address the criminal event.

Finally, at a minimum, if universal jurisdiction is applied in a way that is inimical to U.S. interests, it is incumbent upon the United States to object to that application actively, rather than remain silent, lest that application develop into an accepted norm. As noted in the introductory section, customary international law norms can develop out of acquiescence, and do not require affirmative consent for their development. For example, in reaction to the court action brought in Belgium, Secretary Rumsfeld pointed out how it would be difficult for U.S. officials to continue to participate in NATO activities at NATO headquarters in Belgium if such harassment continued.[32] Belgium subsequently narrowed the scope of its universal jurisdiction statute and

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[29] Michael J. Glennon, *How International Rules Die*, 93 Geo. L.J. 939, 939 (2005) (stating that "[a] rule's abandonment through nonenforcement or noncompliance is known as desuetude," and that the doctrine is known in international law).

[30] H.R. 2050, 108th Cong., 1st Sess. (introduced on May 9, 2003).

[31] The bill also described the circumstances under which governmental agencies would be prohibited from providing assistance to any investigation or prosecution by a foreign government under that state's universal jurisdiction laws, or otherwise actively inhibit the foreign government's pursuit of an investigation under its universal jurisdiction statute.

[32] Donald Rumsfeld, Remarks of the Secretary of Defense outside NATO Headquarters, Jun. 12, 2003, *available at* http://www.defenselink.mil/Transcripts/Transcript.aspx?TranscriptID=2742 ("If the civilian and military leaders of member states cannot come to Belgium without fear of harassment by Belgian courts entertaining spurious charges by politicized prosecutors, then it calls into question Belgium's attitude about its responsibilities as a host nation for NATO and Allied forces. . . . Certainly until this matter is resolved we will have to oppose any further spending for construction for a new NATO headquarters here in Brussels until we know with certainty that Belgium intends to be a hospitable place for NATO to conduct its business. . . . [I]t does not make much sense to build a new headquarters

its Supreme Court dismissed all pending cases against U.S. officials in September 2003.[33] This strong objection had the effect of impeding the development of the norm.

Specific Recommendations for Congress

Congress also has a specific role to play in this area, and should not leave this issue to the resolution wholly by the executive branch.

Expect reports from the executive branch

First, Congress must have full information regarding all instances when one country claims to have jurisdiction over the actions of U.S. officials for official action in third countries. To that end, the committees of jurisdiction should begin to request thorough reports from the Administration on this point. Upon becoming aware of such an assertion of judicial process, Congress can then consider whether it should take legislative action in response.

Publicly condemn inappropriate assertions of universal jurisdiction

Second, Congress should make it a point to condemn inappropriate assertions of universal jurisdiction over U.S. officials for policy actions. Of particular example, Congress should pass a resolution condemning the most recent effort by CCR to request the German authorities to bring a criminal action against Secretary Rumsfeld, and should encourage the German prosecutorial authorities to reject such a request. After all, the United States is perfectly capable of investigating and adjudicating misconduct with respect to the treatment of detainees, as both the Department of Defense and Congress have extensively and thoroughly reviewed detention policies and practices. This public condemnation from the Congress would place the full weight of the United States on record as rejecting this particular use of the customary international law norm, and should help prevent it from becoming widely accepted.

Carefully consider treaties with universal jurisdiction provisions

The Senate also has an obvious role in this area when it considers treaties that purport to create universal jurisdiction. For example, the Torture Convention contains a universal jurisdiction provision that obligates each state party to establish jurisdiction over the crime of torture when the alleged offender is present in its territory, regardless of whether the offender committed the acts on its territory, is one of its nationals, or victimized one of its nationals.[34] In

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if you couldn't come here for meetings."). Then Secretary of State Colin Powell, who was a named defendant in the action, expressed similar concerns in a more veiled manner. Colin Powell, Interview of the Secretary of State with International Wire Services, Mar. 18, 2003, *available at* http://www.state.gov/secretary/former/powell/remarks/2003/18810.htm ("We have cautioned our Belgian colleagues that they need to be very careful about this kind of effort, this kind of legislation because it makes it hard for us to go places that put you at such easy risk. And I know it's a matter of concern at NATO Headquarters, now, and international headquarters sitting there in Belgium where not just U.S. officials but officials from anywhere, where officials of Mr. Sharon can be subject to this kind of litigation.").

[33] Murphy, 97 Am. J. Int'l L. at 987.

[34] Congress executed this requirement by providing jurisdiction for the crime of torture over an alleged offender "if present in the United States, irrespective of the nationality of the victim or alleged offender." 18 U.S.C. § 2340A(b).

recent years, there have been further efforts to create universal jurisdiction over a crime by treaty, rather than allow it to develop by custom.[35] For example, treaties on hijacking and hostage-taking each contain provisions permitting a state party to prosecute individuals believed to have committed the enumerated crimes when such individuals are found within its territory, i.e., under universal jurisdiction.[36]

As the Senate considers any treaty covering an international crime with a universal jurisdiction provision, the Senate must give that treaty, and that provision in particular, a full and extensive examination, in light of the abuses of the customary norm outlined above. Hearings should focus on this issue, and Senators should have the opportunity to debate the broader impact of the provision, especially as it pertains to the U.S. contribution to the development of the norm. The House of Representatives would also have an opportunity to consider universal jurisdiction when Congress considers any legislation required to implement such a treaty.[37]

Hearings to understand the scope of the problem fully

Appropriate Congressional committees should also hold hearings on the topic in order to learn and help shape the current U.S. policy towards the norm of universal jurisdiction. Convening the relevant subject matter experts from both in and out of government would provide the Congress with a forum to receive assessments of the international community's positions with respect to the norm, gain an understanding of the current problems and abuses involved, and evaluate how U.S. actions shape the development of the norm.

For example, on December 6, 2006, Alice Fisher, the Assistant Attorney General for the Criminal Division, announced that the United States would charge "Chuckie" Taylor, the son of former Liberian President and warlord Charles Taylor, with the crime of torture.[38] It is the first time the United States has charged a defendant with this crime. Mr. Taylor was born in the United States, thereby arguably providing a traditional nexus of jurisdiction to the case, but he is being charged with this crime for acts taking place wholly in Liberia, and that he committed in

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[35] Madeline Morris, *High Crimes and Misconceptions: The ICC and Non-Party States*, Law & Contemp. Probs. (Vol. 64, No. 1, Winter 2001), at 13, 60-61. *See also* M. Cherif Bassiouni, *The History of Universal Jurisdiction and Its Place in International Law*, in UNIVERSAL JURISDICTION, p. 39, 278 n.44 (Stephen Macedo ed., 2004) (noting that "several international criminal law conventions that apply to crimes that have not risen to jus cogens contain a provision on universal jurisdiction").

[36] It seems inimical to the concept of customary international law to "create" universal jurisdiction over a crime by treaty provision if it cannot be said that such jurisdiction has ripened yet by custom. For an argument that a treaty provision that provides for universal jurisdiction over a crime should be more properly viewed as articulating in a clear form a proposal, which states are free to accept or reject, for the development of customary law that the crime at issue become recognized as being subject to universal jurisdiction, see Morris, Law & Contemp. Probs. (Vol. 64, No. 1, Winter 2001), at 61-62.

[37] As opposed to its implementation of the Torture Convention, Congress has declined to provide universal jurisdiction for war crimes or genocide. The War Crimes Act of 1996, Pub. L. No. 104-192, 110 Stat. 2104 (Aug. 21, 1996) (codified at 18 U.S.C. § 2441) and the Genocide Convention Implementation Act of 1987, Pub. L. No. 100-606, 102 Stat. 3045 (Nov. 4, 1988) (codified at 18 U.S.C. § 1091), require that the person committing the offense or the victim be a U.S. national, or that the offense took place in the United States. Thus, these statutes require that one of the traditional bases for jurisdiction exist for the action to be a crime under U.S. law.

[38] Department of Justice Press Release No. 06-813, Roy Belfast Jr. aka Chuckie Taylor Indicted on Torture Charges, Dec. 6, 2006, *available at* http://www.usdoj.gov/opa/pr/2006/December/06_crm_813.html.

his capacity as a member of the Liberian Security Forces, all to the detriment of Liberians.[39] It would be beneficial for Congress to examine whether this assertion of jurisdiction by the United States could have the unintended adverse consequence of supporting the use by other states of their universal jurisdiction statutes in ways that may not be as benign.

Conclusion

Universal jurisdiction has a certain allure to it, in that it provides additional avenues in which the worst offenders of justice may be tried for their crimes. But it can be abused in politically motivated ways, and that means greater vigilance will be necessary. The Executive must register diplomatic protest against abusive exercises of universal jurisdiction in order to prevent it from passing into accepted practice over sufficient time. Congress also has a particular role it can play in minding the development of the norm, such as reviewing any treaties that purport to create universal jurisdiction, to further ensure that the norm is not applied or does not develop in ways that are inimical to U.S. interests.

[39] It has not been made clear that any of the victims of this crime were U.S. persons.